Supreme Court, U.S.
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No. 97-1223

IN THE

Supreme Court of the United States

October Term, 1997

THE TOWNSHIP OF NORTH BERGEN, NEW JERSEY,
Petitioner,

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
and
THE NEW JERSEY STATE CONFERENCE, NAACP,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED

Respondents believe that the question petitioner seeks to present for review by this Court was not argued by petitioner to the courts below, and was not decided by them. See pages 5-6, below. Respondents believe that the only question presented for possible review by this Court is:

Whether the Court of Appeals erred in affirming without opinion the decision of the district court to deny petitioner's motion to add five (5) Essex County municipalities as parties necessary for complete relief to this Title VII suit alleging unlawful employment practices by petitioner, where petitioner had not filed a cross-claim against those five municipalities, and where the district court found them to be unnecessary for according complete relief?

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JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit ("the Court of Appeals") was filed on October 15, 1997. The petition was served on January 13, 1998. This Court has jurisdiction under 28 U.S.C. 1254(1).

OPINIONS AND ORDERS BELOW

The Court of Appeals affirmed without an opinion. Pet. App. 3. The Judgment Order (Pet. App. 3a) has not yet been published. The only Opinion of the district court (Pet. App. 18a-31a) was marked "Not for Publication". To the best of our knowledge that Opinion was not published, nor was any order of the district court.

STATEMENT OF THE CASE

A. Statement of the Basic Facts.

The material facts are not in dispute. Pet. App. 19a. The Township of North Bergen, New Jersey, is a municipality located in northern Hudson County, adjacent to Jersey City and within ten miles of Newark. Of North Bergen's 48,414 residents, approximately 2% are African-American (sometimes "black"). Hudson County has a population which is 12-14% African-American, and Jersey City has a population which is 28% to 30% African-American. North Bergen employs 410 full time employees, of whom only two(2), or less than 0.55%, are African-American. Pet. App. 19a.

North Bergen adopted an ordinance imposing a residency policy for municipal employees in 1976, and maintained that policy until decision in this case. For non-sworn positions, North Bergen requires residence in the municipality at time of application and after employment. North Bergen considers residents of other New Jersey municipalities only for the few non-sworn positions that require specialized experience or licenses not available in the resident population. Pet. App. 20a. New Jersey law prohibits municipal residency as a requirement for continued employment for firefighters and police officers. Pet. App. 21a. North Bergen's law therefore provides an absolute preference for those applicants for firefighter and police officer positions who are North Bergen residents but does not require residence after hire. The preference is granted to persons who are bona fide residents of North Bergen from the date of application until the applicants have taken and passed the examination, completed their probationary period and received appointment to the sworn position. The period of residence required for the preference may last up to five or six years. Pet. App. 22a. Each resident applicant for such positions who passes the examination is ranked ahead of all non-residents, even though the non-resident may have received a veterans preference priority or higher score on the examination. North Bergen has always had more resident applicants who pass the examination than vacancies. Pet. App. 22a. As a practical matter, therefore, the preference for residents for sworn positions acts as a requirement that applicants be residents of North Bergen. Pet. App. 21a-22a.

North Bergen's percentage of Hispanic residents has grown dramatically in recent years, and its Town Manager testified on deposition that the "recent hiring statistics reflect the increase in the number of Hispanic residents." App. of Plaintiffs-Appellees in the Court of Appeals 80.

In contrast to the less than 1% African-American work force of North Bergen employees, the full time work force of state and local government establishments located in Hudson County is 19.4% African-American. Pet. App. 19a. In North Bergen itself, the work force of private employer establishments having 100 or more employees is 8.4% African-American. *Id.*

B. Proceedings in the District Court.

After filing a charge of discriminatory employment practices by North Bergen with the EEOC, the NAACP and New Jersey Conference, NAACP, filed this suit on January 20, 1995, alleging that North Bergen's residency policy has a discriminatory impact against blacks and is not job related and therefore violates Title VII. Pet. App. 35a-40a. Defendant North Bergen answered and asserted affirmative defenses and counter-claimed, but did not file a cross-claim against any other municipality or anyone else. Appendix for Defendant-Appellant ("A") 16-20. North Bergen did not file a motion under Rule 14 or under Rule 19 to bring in additional parties in 1995 or in the first nine months of 1996. A4.

Plaintiffs noticed a motion for summary judgment and for a preliminary injunction on October 10, 1995. A4. In support of the motion plaintiffs submitted statistics and opinion evidence by a labor market economist that North Bergen's residence ordinance had a discriminatory impact upon the opportunities of African-Americans in the North New Jersey labor market relevant to North Bergen. In particular, the plaintiffs' evidence showed that the disparity between North Bergen's less than 1% black municipal workforce and the 8.4% black workforce of private employers located in North Bergen was 5.4 standard deviations, and that the disparity between the racial composition of North Bergen's workforce and the black proportion of state and local employees employed in Hudson County as a whole was even larger. Pet. App. 21a-29a. North Bergen did not contest the statistics except to

suggest that the count of private employees was incomplete, because only private employer establishments of 100 employees or more are included in the EEO-1 statistics compiled by the EEOC. Pet. App. 27a. North Bergen has more than 400 full time employees. See above, p. 2. North Bergen introduced no probative evidence showing that municipal residence is positively related to job performance, or that it was otherwise job related, or justified by business needs. Pet. App. 29a-32a.

By Opinion entered on March 19, 1996 (Pet. App. 18a-33a; the notation "Not for Publication" on the first page was not reproduced in the Appendix to the Petition, but is shown at A23 in the Court of Appeals). The district court granted summary judgment in favor of plaintiffs, holding that the less than 1% African-American work force of North Bergen did not occur by chance, and that the record showed no reason other than North Bergen's preference for its residents to explain the gross disparity. Pet. App. 27a-28a. The district court ruled that North Bergen's residency policy was not a lawful affirmative action policy for its Hispanic residents both because the evidence failed even to suggest discrimination by North Bergen and because the residency policy was not narrowly tailored to assist the Hispanic community. Pet. App. 31a-32a.

The district court ruled that plaintiffs' evidence showed that North Bergen's residency requirement had a racially discriminatory impact against African-Americans and that North Bergen had not produced evidence sufficient to warrant a finding that it was job related, relying upon *Newark Branch, NAACP, et al. v. Township of Harrison*, 940 F.2d 792 (3d Cir. 1991). Pet. App. 23a-32a. The district court noted in the Opinion that municipal residency preferences and requirements are not per se unlawful under Title VII, and would not be unlawful in a municipality with an "integrated population." Accordingly, the only issue raised by the law suit was whether the facts showed that North Bergen's residency ordinance operated to discriminate on grounds of race in violation of Title VII. Pet. App. 32, n. 11.

By Order entered the same day, the district court enjoined defendant North Bergen permanently from any further hiring based upon any residency preference or requirement, and preliminarily enjoined any hiring absent a showing of emergency public safety

needs, pending entry of a decree. Pet App. 15a and 16a. The Order directed the parties to attempt to agree upon a final decree, and each of them to file a proposed decree by April 16, 1996, with a supporting memorandum, if agreement was not reached on the content of the decree. *Id.* The time to file proposed decrees was extended to June, 1996, and plaintiffs and the defendant filed their proposals in that month. A53.

After its loss in the district court, North Bergen retained a different law firm and lawyers from that firm entered an appearance for North Bergen on April 11, 1996, in place of the earlier lawyers. A5. On April 24, 1996, a group of resident applicants for firefighter positions moved to intervene, and the motion to intervene was granted on July 3, 1996. A5. On June 14, North Bergen moved to add the New Jersey Department of Personnel as a party, and the district court granted the motion on July 18, 1996. A5. Thereafter the parties offered further evidence and briefs on the issue of appropriate relief. A5-6.

On October 18, 1996, North Bergen moved under Rule 19(a)(1), Fed. R. Civ. P., to join Bloomfield, East Orange, Irvington, Orange, and Newark as necessary parties. A59-60. Defendant North Bergen's Brief in Support of the Motion to Join Necessary Parties, dated October 18, 1996, argued that the joinder of the five Essex County towns was necessary "to ensure complete relief to those already parties, and to prevent discrimination against Hispanics in violation of Title VII." Quote from Table of Contents and Legal Argument, Brief in Support, pages i and 4. In that Brief, North Bergen relied upon case law under Rule 19(a). The Brief cited no cases involving racial classification or "reverse discrimination" under the Constitution or under Title VII. Id. By Order filed November 5, 1996, the district court denied the motion, on the ground that joinder of the five additional "parties is entirely unnecessary for according complete and just relief, because those parties had nothing to do with the merits of this case and need not play a role in fashioning relief." A61-62.

By Decree entered on November 20, 1996, the district court enjoined any further use of any requirement or preference based upon residency in North Bergen (Pet. App. 8a) and required advertising directed to non-residents, and record keeping and

reporting, but declined to order North Bergen to engage in recruiting directed specifically to African-American communities. Pet. App. 5a-12a.

C. Appellate Proceedings.

North Bergen and the applicant-intervenors filed timely notices of appeal, and plaintiffs filed a cross-notice of appeal insofar as it denied plaintiffs the relief they requested. A 74-77. The issues presented by North Bergen on appeal (Brief on Appeal for North Bergen, page 1) were:

"1. Should Summary Judgment have been granted below...?"

"2. Should *NAACP v. Harrison*, 940 F.2d 792 (3d Cir. 1991) have been followed in the ruling below..."

"3. Should the Court below have denied Defendant's motion to join other parties to implement a regional approach to remedy?"

North Bergen did not reproduce in its Appendix on Appeal the brief or exhibits filed on October 18, 1996, in support of its motion to add the five Essex County municipalities. In its argument to the Court of Appeals on Question 3, the "Reciprocity Remedy Raised by the Intervenors," North Bergen cited no case law interpreting the Constitution or Title VII on that issue and argued that the decree will create "discrimination by residency" against residents of North Bergen. Brief for Appellant in No. 96-5826 at 41-43 (quotation from p. 43).

After briefs were submitted, Paul J. Giblin, Esq., was substituted as attorney for North Bergen in the Court of Appeals, and he presented oral argument on its behalf. See file of the Court of Appeals. Oral argument was heard by the Court of Appeals on September 26, 1997. Pet. App. 31. The Court issued its Judgment Order on October 15, 1997, affirming the final Decree of the district court without Opinion. Pet. App. 3a.

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. 2000e et seq., provides in relevant part:

Sec. 701(m), 42 U.S.C. 2000e-(m) provides:

The term "demonstrates" means meets the burdens of production and persuasion.

Sec. 703(a), 42 U.S.C. 2000e provides in part:

(a) It shall be an unlawful practice for an employer...

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities because of such individual's race...

Sec. 703(k)(i), 42 U.S.C. 2000e-2(k)(i) provides in part:

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this Title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race...and the respondent fails to demonstrate that the challenged practice is job related for the job in question and consistent with business necessity; or...

Sec. 706, 42 U.S.C. 2000e-5(g) provides in relevant part:

(g)(1) If the Court finds that the respondent has intentionally engaged in or is intentionally engaged in an unlawful employment practice, the court may enjoin the respondent from engaging in such practice and order such affirmative action as may be appropriate....

REASONS FOR DENYING THE WRIT

The Court of Appeals affirmed the district court decree without opinion. Pet. App. 1a-3a. It therefore made no ruling of general public importance even in the districts of the Third Circuit, but only held on the facts of this case that the district court made no error. The holding of the Court of Appeals is not in conflict with a decision of another Court of Appeals or any State court or with any decision of this Court. The only ruling on which the petition seeks review is the affirmance of the district court's order denying petitioner's motion to add necessary parties under Rule 19(a)(1), Fed. R. Civ. P. That motion was properly denied by the district court on the facts and procedural circumstances of this case. Review should be denied. Rule 10, Rules of this Court.

1. The petition does not seek review of the district court's Opinion and Order of March 19, 1996, holding North Bergen liable for its policy and practice of preferring its residents to non-residents that operates to discriminate in employment on grounds of race against African-American candidates for municipal employment in the relevant North New Jersey labor market. There would be no basis for any such review, because the district court's decision follows established precedent applying the disparate impact branch of Title VII to municipal residency preferences in employment not only in the Court of Appeals for the Third Circuit, but also the reported decisions in other circuits, even before the effective date of the Civil Rights Act of 1991 amendments to Title VII. [1] *United States v. Cicero, Illinois*, 486 F.2d 311 (7th Cir. 1986); *NAACP v. Town of Harrison, New Jersey*, 940 F.2d 792 (3d Cir. 1991); *NAACP v. Town of East Haven, Connecticut*, 70 F.3d 219 (2d Cir. 1995); *United States v. City of Warren, Michigan*, 759 F. Supp. 355 (E. D. Mich. 1992), pending on appeal, Sixth Cir. Nos. 97-1024 and 1075. [2] I Lindemann & Grossman, *Employment Discrimination Law*, (1996, ABA Section of Labor and Employment Law) Ch 6, pp. 195-196.

2a. North Bergen argues that the "remediation plan" in the Decree "mandates reverse discrimination in municipal employment against residents of the Township of North Bergen", because the Decree struck down only the residence provisions of North Bergen's ordinances, and did not strike down such provisions of

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1. The Petition cites and quotes from Sec. 703(a)(1), rather than Sec. 703(a)(2) 42 U.S.C. 2000e-2(a)(2) the subsection providing the foundation for the disparate impact branch of Title VII. Pet. 2; and *Connecticut v. Teal*, 457 U.S. 440, 448-450 (1982). While this suit was filed in 1995 and concerns conduct occurring after November, 1991, and therefore is based upon Title VII as amended by the Civil Rights Act of 1991, the decision of the district court did not rest upon any difference between Title VII before and after the effective date of those amendments, although the language of the Opinion was modified slightly to recognize that fact. Pet. App. 17a and 24a.

2. The defendant City of Warren did not take an appeal on the issue of liability, but cross-appealed only on the issue of back pay. See Brief for Warren as Appellee and Cross-Appellant in Nos. 97-1024 and 97-1075, at pp. 41-42.

five other nearby municipalities. Pet. i (Question Presented) and pp. 6-10. North Bergen relies only upon cases in which this Court and the Seventh Circuit have discussed the issue of whether and in what circumstances government conduct may be based upon a racial or national origin classification under the Constitution. [3] Those cases are inapplicable to a classification based upon municipal residence, which is constitutional unless "irrational." *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645, 646 (1976); *Salem Blue Collar Workers Ass'n. v. City of Salem*, 33 F.3d 265, 271 (3d Cir. 1994), *certiorari denied*, 115 S.Ct. 1105, and cases cited at 268-272. The district court correctly recognized that this case does not raise any issue of the constitutionality of the New Jersey laws authorizing residency preferences, but only concerned the application of Title VII to North Bergen's use of such a classification as a basis for employment decisions in the context of its segregated residential pattern and the diverse labor market in which it is located. Pet. App. 32a, n. 11. Accord: *Newark Br. NAACP, et al. v. Town of Harrison, supra*, 940 F.2d at 800-805.

b. North Bergen did not argue to the lower courts the constitutional question it asks this Court to review. On appeal to the Court of Appeals, North Bergen argued that the diminished municipal job opportunities for residents of North Bergen for jobs there resulting from the Decree's striking North Bergen's residence requirement without striking residence preferences of five other municipalities constituted an "obvious and gross inequity" and resulted in "unfairness" to residents of North Bergen. Br. for Appellant, pages 41-43. However, that Brief recognized that the result would be "discrimination by residency." *Id.* North Bergen did not argue to the Court of Appeals or the district court that such discrimination by residency constitutes a racial classification, or

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3. The decision in *Hirabayashi v. United States*, 320 U.S. 81 (1943) involved the classification of American citizens by Japanese ancestry. The other cases involved the constitutionality of racial classifications or "race based" preferences by a government. *Regents of U. of California v. Bakke*, 438 U.S. 265 (1978); *Wygant v. Jackson Board of Ed.*, 476 U.S. 267 (1986); *City of Richmond v. Croson Co.*, 488 US. 469 (1989); and *Aderand Constructors Inc. v. Pena*, 515 U.S. 200 (1995); *United States v. Paradise*, 480 U.S. 149 (1987); and *Witmer v. Peters*, 87 F.2d 916 (7th Cir. 1996).

racial discrimination in violation of the Constitution of the United States or Title VII. [4] See pp. 5-6, above. The petition should be denied because the issue petitioner seeks to present was not argued to or decided by the courts below. See, *Lytle v. Household Mfg. Inc.*, 494 U.S. 545, 551-552, n.3 (1990 Opinion of this Court), and 556 (Concurring opinion of Justices O'Connor and Scalia) and cases cited.

c. In any event, the district court's denial of North Bergen's motion to add additional parties was proper. North Bergen filed the motion under Rule 19(a)(1), which provides for the addition of a party as a matter of right only "if (1) in the person's absence complete relief cannot be accorded among those already parties." Rule 19(a), Fed. R. Civ. P. In this case, North Bergen had made no claim or cross-claim against the five municipalities or any other third party. See "Answer, Affirmative Defenses and Counterclaim" filed February 25, 1995. A4-6, A16-20. Nor did North Bergen ever serve a summons and cross-claim against a third party under Rule 14(a). Nor has North Bergen ever explained why it was necessary or proper to add five Essex County municipalities to this law suit, where the Decree only prohibits preferences based upon "residence in North Bergen" and permits North Bergen to require uniformed and other rapid response personnel to reside in an area within ten (10) miles of North Bergen. Pet. App. 8a. The district court properly ruled that the addition of the five Essex County municipalities that North Bergen sought to join on October 18, 1996, "is entirely unnecessary" as those municipalities "had nothing whatsoever to do with the merits of this case" (Pet. App. 14a) because no claim or cross-claim had been made by or against any of those municipalities by North Bergen. The denial of the motion to add five additional parties to a suit almost seven months after liability had been determined, and three months after the

4. Not one of the cases cited in the Petition in this Court was relied upon or cited by North Bergen in its Brief in the Court of Appeals (Brief for Appellant, pp. 41-43 and Table of Authorities) or in the Reply Brief portion of the Reply Brief/Response Brief, or in the district court in its brief in support. North Bergen did cite *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) in opposition to "plaintiffs' proposed remedy" in the Response Brief portion filed as cross-appellee. Reply Br./Response Br. 12.

parties had submitted their views on appropriate relief was also supported by the untimeliness of the request. See pp. 5-6, above. There was no departure from the "usual and accepted course of judicial proceedings" in this case. Compare, Rule 10(a).

CONCLUSION

For the reasons set forth above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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